Supreme Court, U. S.
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MAY 4
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 76-1365

SILAS W. REDMOND - - - - Appellant

versus

ROBERT WHEELER,
C. P. SULLIVAN,
HOWARD DOWDY,
JAMES ALEXANDER, JR.,
E. A. ROSS, and
E. W. ANDERSON, JR.,
Board of Trustees of the Policemen's and Firemen's Pension Fund for the City of Mayfield, Kentucky - - - - Appellees

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On Appeal from the Supreme Court of Kentucky

MOTION TO DISMISS

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IN THE

SUPREME COURT OF THE UNITED STATES

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SILAS W. REDMOND - - - - *Appellant*

v.

ROBERT WHEELER,
C. P. SULLIVAN,
HOWARD DOWDY,
JAMES ALEXANDER, JR.,
E. A. ROSS, and
E. W. ANDERSON, JR.,
Board of Trustees of the Policemen's and Firemen's Pension Fund for the City of Mayfield, Kentucky - - *Appellees*

ON APPEAL FROM THE SUPREME COURT OF KENTUCKY

MOTION TO DISMISS

The Appellees move the Court to dismiss the appeal herein on the ground that the judgment below rests on an adequate and independent non-federal basis and because it is manifest that the questions presented by this appeal are so unsubstantial as not to need further argument.

STATEMENT OF THE CASE AND THE PROCEEDINGS BELOW

The Appellant, Silas W. Redmond, was employed on October 1, 1952, as a policeman by the City of Mayfield, a Kentucky city of the third class located in Graves County, Kentucky. He continued to work as a policeman for the city until December 8, 1967, at which time he claimed to be physically unable to perform certain duties incident to his employment. Subsequent to December 8, 1967, he never attempted to perform the duties required of a police officer, never attempted to return to his place of employment, and never called to inform the police department why he had not resumed the duties of his office. Soon thereafter the city hired another policeman to replace him.

On December 14, 1967, a class action suit was filed in the Graves Circuit Court demanding that the city establish a pension fund for policemen and firemen pursuant to KRS 95.520-95.620 retroactive to June 6, 1966, the effective date of certain applicable statutory amendments. (Prior to the filing of this suit and during the period of the Appellant's employment, the employees of the city had been covered by the Social Security Act and contributions had been made by the city on their behalf.) On July 25, 1968, the Graves Circuit Court ordered the city to establish such a fund, but did not require the city to make this pension fund retroactive to June 6, 1966. No appeal was taken from that judgment.

By ordinance passed on November 11, 1968, the city established a Policemen's and Firemen's Pension Fund pursuant to KRS 95.520-95.620, to become effective on January 1, 1969. The Ordinance directed that the Fund be financed as provided in KRS 95.580 by an ad valorem tax to be levied on all property located in the city subject to city taxation beginning with tax year 1969 and by funds to be withheld from the salaries of the individual firemen and policemen beginning January 1, 1969. While employed as a policeman, the Appellant never made any claim that the city should establish such a fund, and since the Fund was neither created nor financed until after he was no longer employed as a policeman, he never made any contribution to the Fund.

The Appellant thereafter filed an application with the Board of Trustees of the Policemen's and Firemen's Pension Fund for the City of Mayfield, Kentucky, the Appellees herein, alleging that he was entitled to a permanent disability pension pursuant to KRS 95.550(1)(b). Pursuant to KRS 95.540, a hearing preceded by timely notice was held on his application on June 21, 1972. At this hearing he was represented by counsel, testified in his own behalf, and submitted other sworn testimony in support of his claim. The hearing was adjourned to June 30, 1972, at which time additional evidence was submitted and his counsel made argument to the Board in support of his application for a pension.

The Appellant's application for a pension was subsequently denied by the Board of Trustees who found

that his disability was not due to his service as a policeman and also that he was not covered by the provisions of the Fund since his employment as a policeman had terminated prior to the effective date of the Fund (pages 7a-9a of the Jurisdictional Statement).

He then filed suit in the Graves Circuit Court seeking reversal of the Board's decision, alleging that the Board's findings were contrary to the evidence, that he had been denied due process of law at the hearing on his application, and that he had been unconstitutionally denied a property right, namely a pension based upon a disability incurred in the performance of his duty as a policeman and by reason of his service in the Police Department (pages 1a-4a of the Jurisdictional Statement).

The Graves Circuit Court reviewed the pleadings and proof submitted in support of the Appellant's application for a pension and entered Findings of Fact and Conclusions of Law upholding the ruling of the Board of Trustees. The court specifically found that the Board of Trustees had not abused its discretion or acted arbitrarily in denying the Appellant's application for a pension and further concluded that it would be inequitable for him to receive such a pension since he was not employed by the city after the Pension Fund became effective and had never made any contribution to the Fund (pages 5a-13a of the Jurisdictional Statement).

The Appellant thereafter appealed the decision of the Graves Circuit Court to the Court of Appeals of Kentucky. That court affirmed the Judgment of the

circuit court stating that neither justice nor practicality required that the Appellant be entitled to share in a pension fund which was not established until long after he had ceased to be an active policeman and to which he had never contributed (pages 15a-21a of the Jurisdictional Statement). The Supreme Court of Kentucky denied the Appellant's Motion for Discretionary Review of the decision of the Court of Appeals, thereby affirming that court's opinion (page 23a of the Jurisdictional Statement).

ARGUMENT

The Judgment Below Rests Upon an Adequate and Independent Non-Federal Basis

The decision of the Kentucky court which Appellant asks this Court to review rests on an adequate and independent non-federal basis. As the record herein clearly shows, the fund from which the Appellant seeks a pension was not created until long after he had left the employment of the city and he made no contribution to it during his period of employment. There is no dispute or question as to these facts. In considering the Appellant's application for benefits, the Board of Trustees, the Graves Circuit Court and the Kentucky Court of Appeals all held that the Appellant was not entitled to any benefits from the Pension Fund because he was not an active policeman on the date that the Fund was established and because he had never contributed to the Fund. This determination of the threshold question constitutes sufficient cause to deny the Appellant's application for a pension and consideration

of the remaining issues the Appellant seeks to raise is unnecessary. This is a question of state substantive law rather than federal law and is an adequate and independent non-federal basis for the previous rulings by the Kentucky courts. On this ground alone this Court should dismiss this appeal and affirm the decision of the state court. *Murdock* v. *City of Memphis,* 20 Wall. 590, 22 L.Ed. 429 (1875). *Henry* v. *State of Mississippi,* 379 U. S. 443, 446, 85 S. Ct. 564, 567, 13 L.Ed. 2d 408 (1965), rehearing denied 380 U. S. 926, 85 S. Ct. 878, 13 L.Ed. 2d 813 (1965).

The Questions Presented Are So Unsubstantial As Not To Need Further Argument

Although the decisions below rest on an adequate and independent non-federal basis, the questions presented in Appellant's Jurisdictional Statement are clearly not of a substantial nature requiring further review by this Court. These questions generally concern the conduct of the hearing afforded the Appellant by the Appellees as members of the Board of Trustees of the Policemen's and Firemen's Pension Fund for the City of Mayfield, Kentucky.

The Appellant claims that he was denied due process of law by the Board because of certain statements made during the course of the hearing by Appellee, E. W. Anderson, Jr. The remarks in question appear in the Jurisdictional Statement (pages 10-13). A review of these statements in the context in which they were made readily shows that Appellant's claim is totally without merit. To the contrary, the transcript clearly

shows that the member in question was attempting to resolve the issues presented in a fair and impartial manner.

The Appellant further claims that the Board's findings were not supported by the evidence of record. The evidence submitted concerning the nature and cause of the Appellant's physical condition and the nature and extent of his disability, if any, was conflicting and presented a factual determination to be made by the Board. The Board's finding that the Appellant was not disabled as a result of his service as a policeman is supported by evidence of record. This is a purely factual determination not presenting a substantial federal question requiring any consideration by this Court. The Board and lower courts have all concluded that the Appellant is not eligible for a pension on adequate and independent state grounds based on undisputed facts.

The Appellant's further claim that the hearing afforded him violated Articles II and XIV of the Constitution of Kentucky likewise presents no federal question for review by this Court.

The questions sought to be presented by this appeal are remarkably similar to those recently before this Court in the case of *Hortonville Joint School District No. 1, et al.* v. *Hortonville Education Association, et al.* —— U. S. ——, 96 S. Ct. 2308 (1976). In view of this Court's opinion in that case, further consideration of the questions the Appellant seeks to present is unnecessary and his appeal should be dismissed.

CONCLUSION

Wherefore, the Appellees respectfully submit that the judgment below rests upon an adequate and independent non-federal basis and that the questions presented are so unsubstantial as not to need further argument, and the Appellees respectfully move the Court to dismiss this appeal.

Respectfully submitted,

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Sam Boyd Neely
Counsel for Appellees